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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 542

WESTERN AIR LINES, INC.,
Petitioner,
v.
CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

No. 542

Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District, Division One

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinions below are correctly described in Petitioner's writ, on page two thereof.

JURISDICTION

The certiorari jurisdiction of this Court has been invoked by Petitioner pursuant to 28 U.S.C. § 1257(3).

Respondent claims that jurisdiction is not properly invoked.

QUESTIONS PRESENTED

The case concerned rates charged Petitioner at the San Francisco International Airport which Petitioner, in its amended and supplemental answer, alleged were unjustly discriminatory in violation of Section 1110 of Title 49, United States Code (60 Stat. 176 (1946)) "and the written assurances and agreements of plaintiff given pursuant thereto to the Civil Aeronautics Administrator," and which were further alleged to be "in violation of constitutional limitations and the law of this State."[1]

The trial court, after appropriate findings of fact adverse to Petitioner's allegations, determined that the rates and charges in controversy were "fair, just and reasonable, and are not, and were not, unjustly or wrongfully discriminatory to the defendant; nor did said rates and charges * * * constitute an unjust or wrongful discrimination against, or unreasonable classification of defendant under * * * the said Municipal and County Airport Law, the Constitution of the State of California, the Charter of the City and County of San Francisco, or other statutes of the State of California, or the common law thereof, the Constitution of the United States, or the Federal Airport Act, or any other Federal Statute or administrative regulation, or under any assurances

[1] Paragraph XVI of Petitioner's amended and supplemental answer. (C.T. 23-39.)

or agreements or statement of policy made by plaintiff to the United States, or to any of its departments, agencies, or bureaus." (C.T. 61:2-23.)

The California District Court of Appeal, and by its denial of a hearing, the California Supreme Court, affirmed a factual finding and determination of the trial court that no unjust discrimination existed. The trial court (and the appellate court) further concluded, "That the assurances or agreements entered into between plaintiff and the United States, or its agencies, bureaus, or departments, under the Federal Airport Act, or any other statutory provision or administrative regulation, did not confer on defendant the right to assert any cause of action for alleged unjust discrimination by plaintiff in the ownership or operation of said airport." (C.T. 61:24-62:4.)

Under the record, the question presented, in reality, is this: Where a state trial court has concluded as a matter of fact and as a matter of law, affirmed on appeal, that no unjust discrimination existed under either the laws of the State of California or under the Federal Airport Act, does a judgment based thereon present a proper case for review by this court on writ of certiorari merely because the trial court further concluded, affirmed on appeal, that no cause of action existed under the Federal Airport Act?

Under the law of California and under the Federal Airport Act, the question is the same—was there unjust discrimination?

The state courts below, on abundant evidence, determined there was no unjust discrimination under the California law nor under the Federal Airport Act. Petitioner, oblivious of this phase of the record, seeks a

review of a superfluous holding that the Federal Airport Act did not confer on Petitioner any right thereunder to assert a cause of action for alleged unjust discrimination.

If the Federal Airport Act did confer a right to assert a cause of action for alleged unjust discrimination, the California courts have already decided that there was no unjust discrimination thereunder. This factual determination resolves the entire matter. If the Federal Airport Act did not confer a right to assert a cause of action thereunder against the City and County of San Francisco, that also should be the end of the matter.

STATUTES INVOLVED

The legal question which Petitioner seeks to present involves the entire Federal Airport Act, as well as the single section (60 Stat. 176, 49 U.S.C. § 1110) quoted by Petitioner. (Petition for Writ of Certiorari, p. 3.) Said quoted provision must be read in context (as was done by the California District Court of Appeal) with knowledge of the purposes of the entire statute.

STATEMENT OF THE CASE

The present litigation arises from a dispute over the imposition of rates and charges for aeronautical common use facilities at San Francisco International Airport (hereinafter designated "Airport"), operated by Respondent pursuant to the provisions of its Charter and the Municipal and County Airport Law of the State of California, (Cal. Stats. 1927, pp. 485-487), codified in the California Government Code as Sections 50470 through 50478 (Cal. Stats. 1949, pp. 267-268).

For the period between January 1, 1951 and August 31, 1957, Respondent brought the present action to recover the stipulated sum of $214,385.74, representing rates and charges for the use by Petitioner of the common use facilities. The Superior Court of the City and County of San Francisco determined that Respondent was entitled to retain the said sum in dispute. Petitioner appealed to the California District Court of Appeal, which affirmed said judgment and denied Petitioner's petition for rehearing. Petitioner unsuccessfully sought a hearing before the California Supreme Court.

Under the heading, "B. Facts Basing Petitioner's Claim," Petitioner sets forth its version of the facts. If Petitioner actually set forth all of the facts relating to its claim, it would be readily apparent that the trial court properly determined, as it did, there was no unjust discrimination against Petitioner under the California law or under the Federal Airport Act.

The District Court of Appeal in its opinion (Petition for Writ of Certiorari, Appendix, pp. 1-12) sets out with accuracy the factual background of the case. It would serve no good purpose to repeat it here. It is important to note that it was an agreed-to fact that the charges for the common use facilities were not excessive and were at all times reasonable.

ARGUMENT

Inappropriateness of the Granting of the Writ of Certiorari.

In reality, Petitioner seeks to have this Court review a factual determination of the California Superior Court, i.e., the non-existence of unjust discrimination under California law or the Federal Airport Act, finally affirmed on appeal by the California state courts.

In this connection, it has been well settled by this Court that granting a writ of certiorari is not warranted merely to review the evidence or inferences derived therefrom.

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178;

Cf.:

National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 502-503.

Due to its failure to establish the existence of "unjust discrimination" as a factual matter, the additional issue proposed by Petitioner, i.e., the question of whether a cause of action may be stated under the Federal Airport Act is an "academic question" inappropriate for review by certiorari.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74.

Another pertinent consideration in regard to the inappropriateness of certiorari is that the present controversy concerns rates and charges for a defined period in the past. Said controversy ended in 1957; hence, nothing in the litigation at bar presently affects Airport management, or the administration of or the allocation of aid under the Federal Airport Act.

In the absence of any need for the settlement of any pressing public issue, Respondent contends that there are neither special nor important reasons for certiorari in the present case.

Rice v. Sioux City Memorial Park Cemetery, supra,
349 U.S., at 73-74;

Layne & Bowler Corp. v. Western Well Works,
261 U.S. 387, 393;

National Labor Relations Board v. Pittsburgh Steamship Co., supra,
340 U.S., at 502;

Revised Rules of the Supreme Court of the United States,
(28 U.S.C.A.) Rule 49(1).

I

Petitioner Did Not Carry Its Burden of Proof. It Was Properly Found, as a Matter of Fact, That No Unjust Discrimination Existed.

The opinion of the California District Court of Appeal (Petition for Writ of Certiorari, Appendix, pp. 42-43) clearly establishes that the trial court made a factual determination of the nonexistence of asserted "unjust discrimination." Under decisions of this Court, a finding of the existence or nonexistence of unjust discrimination in a utility rate proceeding is a factual finding binding upon an appellate court.

Interstate Commerce Commission v. Alabama Midland Ry. Co.,
168 U.S. 144, 170;

Barringer & Co. v. United States,
319 U.S. 1, 6-7;

Pennsylvania Co. v. United States,
236 U.S. 351, 361;

Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92, 103.

Cf.:

Postal Telegraph-Cable Co. v. Associated Press (1920), 228 N.Y. 370, 376-379, 127 N.E. 256, 258-259.

As the California District Court of Appeal in its opinion cogently observed —

> "The trial court heard and examined voluminous evidence dealing with the history of the airport, its growth and development, the purposes and objectives of long-term leases, and the rate fixing policies of the City's Public Utilities Commission. In our view, it could have properly concluded in the light of such evidence that the two classifications of users of the common facilities, which we have set out above, were reasonable and were based on material differences in the conditions and circumstances affecting each group. * * *" (Petition for Writ of Certiorari, Appendix, p. 47.)[2]

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[2] In this connection, Respondent would like to refer this Court to *Board of County Commissioners of Dade County, Florida, etc. v. Aerolineas Peruanas, S.A., et al.*, and *Board of County Commissioners of Dade County, Florida, etc., v. Lineas Aereas de Nicaragua, S.A.*, recently decided (August 31, 1962) by the United States Court of Appeals for the Fifth Circuit and numbered therein 19476 and 19632, respectively, after previous decision by the United States District Court for the Southern District of Florida, Miami Division, under the title *"Aerovias Interamericanas de Panama, S.A., et al. v. Board of County Commissioners of Dade County, Florida, etc.," (1961)*, 197 F. Supp. 230.

The decision of the Fifth Circuit concerns the analogous situation of alleged unjust discrimination asserted by certain foreign air carriers which sought recovery of rate differences due to the charging to other carriers of lower rates by reason of pre-existing contracts. The Fifth Circuit held that judgment should have been entered as a matter of law in favor of the airport authority, and observed that there is no obligation to provide the objecting airlines the same low rates as the five airlines with original contracts, which "joined with appellant to establish and sustain the airport in its infancy."

The Fifth Circuit also cited the ruling of the Administrator of Civil Aeronautics on the matter in question, which stated:

> "'The unjust discrimination provisions incorporated in grant agreements pursuant to the Federal Airport Act, in our opinion, do not require that the airport

Petitioner relies on *Western Union Telegraph Co. v. Call Publishing Co., supra,* 181 U.S. 92. In said case, this Court (181 U.S., at 103) recognized that "it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination.[3] In this connection, this Court further significantly added "and questions of fact, as it has been repeatedly held, when once settled in the courts of a state, are not subject to review in this court." (181 U.S., at 103.)[4]

II

There Is No Cause of Action Created by the Federal Airport Act for the Benefit of Third Parties Upon Agreements Between the United States and Municipal Agencies, for the Payment of Grants-in-Aid for Municipal Airport Construction.

There is no conflict of decisions as postulated by Petitioner.

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owner refrain from charging users of the airport, rates higher than those to which other users of the same class are entitled under previously executed contracts which were reasonable when executed (see *Trans World Airlines, Inc. v. City and County of San Francisco*, U.S.C.A. 9th, Dec. 19, 1955, 228 F. (2d) 473, 4 Avi. 17,866, cert. den. April 30, 1956). * * *"

[3]The *Western Union case* concerned a fact situation where, under the jury instructions, the jury had to find that the discriminatory rate was an *unreasonable* one. (181 U.S., at 97-98.) Said holding is inapplicable to the situation at bar where the rate charged was concededly reasonable.

[4]The only other authorities on which Petitioner relies in connection with its assertion of unjust discrimination are *Hillsborough County Aviation Authority v. National Airlines*, 63 So.2d 61 (Fla. Sup. Ct., 1953), and *L. T. Barringer v. United States, supra*, 319 U.S. 1.

The *Hillsborough case* does not assist Petitioner, since it does not concern unjust discrimination under the Federal Airport Act (60 Stat. 176, 49 U.S.C. § 1110), and holds that a right conferred on an airline to an exclusive sign location on a hangar building on terms which are "fair and reasonable" will not amount to "unjust discrimination" under a "no 'exclusive right' of use" provision of the Civil Aeronautics Act of 1938. (63 So.2d at 63-64. Nothing in the *Hillsborough case* suggests that justification for airport rates and charges must depend solely upon a consideration of the common use facilities which are furnished, rather than of all facts and circumstances of the airport operation.

Similarly, the *Barringer case* does not support Petitioner's position for the reasons explained in the opinion of the California District Court of Appeal, i.e., that there were *dissimilar circumstances* distinguishing the use of the Airport by United and TWA from that by Petitioner and other airlines similarly situated. (Petition for Writ of Certiorari, Appendix, pp. 47-51.) Indeed, as the *Barringer case* itself recognizes, even under the Interstate Commerce Act, differences in rates may be justified on the basis of dissimilar circumstances, including the necessity of meeting changing competitive conditions. (319 U.S., at 6-8.)

While Petitioner relies on *Northeast Airlines, Inc. v. Weiss,* 113 So.2d 884 (District Court of Appeal of Florida, Third Dist. 1959), certiorari denied by the Florida Supreme Court, 116 So.2d 772, as creating such a conflict, the decision of the intermediate state appellate court in the *Weiss case* is fully and completely distinguished by the California District Court of Appeal (Petitioner for Writ of Certiorari, Appendix, pp. 19-21) as determining only the issues (which are not involved in this case) of the exhaustion of administrative remedies and applicability of the doctrine of primary jurisdiction.

The *Weiss case* contains no holding, nor does it examine the question, as to whether the Federal Airport Act creates a third party cause of action. On the contrary, the decision of the California District Court of Appeal that no such cause of action exists, is in accordance with the opinion of the United States District Court for the Southern District of Florida in *Aerovias Interamericanas de Panama, S.A., et al. v. Board of County Commissioners of Dade County, Florida, etc.* (1961), 197 F. Supp. 230, at 236 (reversed on other grounds in cases cited footnote 2, *supra*), holding that the Federal Airport Act (as well as other statutes) did not empower airlines to sue as third parties on grant-in-aid agreements between a municipality operating an airport and the United States Government. (See California District Court of Appeal opinion, Petition for Writ of Certiorari, Appendix, p. 21, footnote 11.)

On the merits, the California District Court of Appeal correctly determined that nothing in the Federal Airport Act, in the assurances given thereunder, or in other assurances, intended to confer on any third party

a cause of action to recover assertedly discriminatory airport rates and charges.[5] This construction is in accordance with decisions of this Court under other statutes.

T.I.M.E. v. United States,
359 U.S. 464, 468-471;

Nashville Milk Co. v. Carnation Co.,
355 U.S. 373, 377-379.

As the California District Court of Appeal explained, the Federal Airport Act of 1946 is not to be construed as a regulatory statute, but rather as an enactment to secure cooperative federal and municipal co-sponsorship of a nationwide program for the construction of adequate local airport facilities, with the provision of limited remedies on the part of the Administrator to assure the carrying out of said purposes. (See California District Court of Appeal opinion, Petition for Writ of Certiorari, Appendix, pp. 16-18; see, particularly, legislative history recited in footnote 10 of the Appendix, pp. 16-17.)

It therefore correctly determined that construction of the Act to provide an additional private remedy would not further the basic objectives of the statute and would not be in accord with congressional intent.

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[5] It should be noted, as stated by this Court in *De Sylva v. Ballentine*, 351 U.S. 570, at 580, that "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law." Accord: *Reconstruction Finance Corp. v. County of Beaver*, 328 U.S. 204, 210; *Hayes v. Seaton*, 270 F.2d 319, 324-325 (106 App. D.C. 126, 131-132) cert. den. 364 U.S. 814; rehearing den. 364 U.S. 906.

Respondent suggests that pursuant to this principle, California state courts could properly review and determine the existence of third party beneficiary rights under the terms of the grant-in-aid agreements as a matter of state law governing construction of contracts.

In this matter, the state courts examined the question of the existence of the cause of action both from a federal and a state standpoint. (Petition for Writ of Certiorari, Appendix, pp. 17-26.)

CONCLUSION

In view of the factual nature of the question sought to be reviewed and the correctness of their determination by the state courts, Petitioner does not present a substantial federal question.

It is therefore respectfully urged that the petition for a writ of certiorari be denied.

DATED: San Francisco, California, November 13, 1962.

Respectfully submitted,

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